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No. 89-1044

In The

Supreme Court of the United States

October Term, 1989

OCEAN STATE PHYSICIANS HEALTH PLAN, INC., ET AL.,

Petitioners,

v.

BLUE CROSS AND BLUE SHIELD OF RHODE ISLAND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF OCEAN STATE PHYSICIANS HEALTH PLAN, INC., ET AL.

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February 28, 1990

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF OCEAN STATE PHYSICIANS HEALTH PLAN, INC., ET AL.

The American Medical Association respectfully submits this brief as *amicus curiae* in support of Ocean State Physicians Health Plan, et al. The written consent of all parties has been obtained and filed with the Clerk in accordance with Supreme Court Rule 36.2.

INTEREST OF AMICUS CURIAE

The American Medical Association ("AMA") is a private, voluntary nonprofit organization of physicians. The AMA was founded in 1847 to promote the science and art of medicine and the improvement of the public health. Its membership exceeds 285,000 physicians and medical students.

The AMA is dedicated to promoting the public welfare through the maintenance of appropriate professional standards and the provision of quality health care. The AMA believes that a competitive market for physician services is essential to this goal by assuring the efficient delivery of the health care needed by the public. Preservation of competition in the marketplace depends upon fair and equitable enforcement of the antitrust laws.

The Court of Appeals decision in this case has nationwide ramifications with respect to the ability of dominant medical insurers to use their market power to disrupt competition in the market for physician services. Respondent in this proceeding, Blue Cross and Blue Shield of Rhode Island ("Blue Cross"), has conceded that it possesses market power, and it is the position of the AMA that respondent has abused that market power through the practices at issue in this case. The AMA participates in this proceeding to urge the Court to grant the petition for certiorari and to protect the emerging competition of small health insurers from the improper exercise of market power.

INTRODUCTION

Petitioner Ocean State Physicians Health Plan ("Ocean State") is a primarily physician-sponsored Health Maintenance Organization ("HMO") which has operated in Rhode Island since 1984. *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1103 (1st Cir. 1989).[1] An HMO is an organized system of health care delivery which provides comprehensive health services to voluntarily enrolled members. HMOs combine both delivery and financing of health care in one system. Members do not submit claims for reimbursement, as in an indemnity insurance plan, but rather pay a fixed monthly fee regardless of the services received. American Medical Association, *How to Evaluate a Managed Care System Contract* p. 67 (1988).

HMOs have several characteristics which enable them to operate at a lower cost than traditional indemnity insurers. Among these are (1) the provision of better information to consumers regarding health care services; (2) the use of utilization review, patient copayments, and physician incentives to reduce the incidence of unnecessary services; and (3) the integration of various components of health care delivery (e.g., general practitioners, specialists, and hospitals) to create efficiencies. C. F. Rule, Assistant Attorney General, Antitrust Division, Remarks Before the Group Health Association of America, *Health Care and Antitrust Enforcement: The Buyer's Eye-View*, p.4-5 (Feb. 28, 1989).

[1] The opinion of the district court in this case is reported at 692 F.Supp. 52. The decisions of both courts below are reprinted in the Petitioners' Appendix.

The efficiency of HMOs has enabled them to compete successfully with other health care insurers, especially indemnity plans such as Blue Cross. HMOs grew from 175 plans with 6 million members in 1976 to 662 plans with 28.5 million members in 1987. United States Department of Commerce, *Statistical Abstract of the United States* p.97 (1989). By January, 1990, there were 607 HMOs serving 32.5 million people—nearly 13 percent of the population. Belkin, *Many in Medicine are Calling Rules a Professional Malaise*, N. Y. Times, Feb. 19, 1990, at A1.

The Department of Justice understands the importance of the antitrust laws in preserving competition by HMOs. "The antitrust laws serve to ensure that these nascent market forces are allowed to continue to develop and that American consumers of health care are able to enjoy the economic benefits of those developments." Remarks of C. F. Rule, *Health Care and Antitrust Enforcement* at 6.

This case is an example of the use of market power by a large indemnity insurer to squelch the successful entry of an efficient HMO. Respondent Blue Cross is by far the largest health insurer in Rhode Island. The district court found that Blue Cross "clearly had market power." 692 F.Supp. at 58. On appeal, Blue Cross conceded that it possesses monopoly power in the health insurance market. 883 F.2d at 1110. Blue Cross is also the dominant purchaser or marketer of physician services in Rhode Island. Ninety percent of the state's physicians participate in Blue Cross plans. (J.A. 52, 318-20.)[2]

[2] References are to the Joint Appendix ("J.A.") and Plaintiff's Exhibits ("P.E.") in the record on appeal.

Ocean State and Blue Cross compete directly by offering their health benefit plans to employers. Prior to Ocean State's entry to the market, "competition from other health care financing insurers was virtually non-existent." 692 F.Supp. at 56. Although Blue Cross is much larger, Ocean State has proven to be a successful competitor. It exceeded all expectations and grew to 70,000 subscribers by the Spring of 1986. 692 F. Supp. at 57. During the same period, Blue Cross lost 30,000 subscribers. *Id.*

Ocean State was successful due to its 1,200 participating physicians, as well as its use of several cost-saving programs, including utilization review and physician incentives. (J.A. 763, 806-07, 2167-69; P.E. 45.) Moreover, Ocean State's physicians shared in the risk of loss of the venture. Twenty percent of their fees were withheld contingent on Ocean State's profitability, enabling it to offer a health benefit package 15 percent broader than the Blue Cross plan at a 5-7 percent lower price. (P.E. 45.) Ocean State returned the withhold to physicians in 1984, but retained it in 1985 due to higher than anticipated operating expenses. 692 F.Supp. at 60.

Following the entry of Ocean State and the subsequent loss of 30,000 subscribers, Blue Cross raised its premium rates to maintain sufficient cash reserves to meet state law requirements. These price increases led to further enrollment losses and additional premium increases. 692 F.Supp. at 57. As a result, Blue Cross lost over $26 million on its group insurance business, and a substantial number of subscribers as well, during an 18-month period in 1985 and 1986. (J.A. 1109-10; 2017.) Blue Cross then launched a three-pronged plan directed at Ocean State. 692 F.Supp. at 58. The initiative included a new pricing policy which discriminated against employers who offered

a competing health plan (adverse selection), the introduction of an HMO (HealthMate), and the use of a most favored nations clause, called Prudent Buyer.[3] This brief focuses only on the legality of the Prudent Buyer policy.

The Prudent Buyer policy provided that Blue Cross would not pay more for physician's services than any of its competitors. 692 F.Supp. at 60. Blue Cross implemented this most favored nations policy by reducing fees of Ocean State physicians by 20 percent. *Id.* at 60-61. This amount reflected the withhold Ocean State physicians accepted as a risk sharing and cost containment device. *Id.* The Blue Cross fee reduction was a pure discount, and did not reflect risk sharing or any cost containment incentive. Moreover, this most favored nations policy was followed primarily with respect to Ocean State physicians, and not with Blue Cross' other competitors. (J.A. 780.)

The effect of Blue Cross' strategy was quick and decisive. Ocean State lost nearly one-third of its physicians, incurred a substantial increase in costs, and lost subscribers. 692 F.Supp. at 61. Ocean State's costs increased because the loss of 350 participating physicians forced it to secure services from non-participating physicians at a higher price. Non-participating physicians are those who had not agreed to the twenty percent withhold of their fees. Blue Cross, meanwhile, was able to implement a prompt increase in premiums and realize a $10 million surplus. (J.A. 1110-13, 1847-49, 2183-84.)

[3] The Court of Appeals held that the implementation of the adverse selection policy and HealthMate were exempt from the antitrust laws under the McCarran-Ferguson Act. 883 F.2d at 1109. That issue will not be addressed in this brief.

REASON FOR GRANTING THE WRIT

There is an important reason for granting the petition for a writ of certiorari in this case. The decision below condoned exclusionary conduct by a monopolist which injured an efficient new competitor. Blue Cross imposed a most favored nations clause on physicians which was designed to, and did, cause many of them to resign from Ocean State. Having thus raised its rival's costs, Blue Cross was able to increase its prices and harm not only Ocean State but also the public.

If permitted to stand, the decision below could result in similar injury to fledgling HMOs throughout the country. In ruling that the Blue Cross Prudent Buyer policy was lawful because it did not force physicians' prices below cost, the Court of Appeals foreclosed any meaningful opportunity to protect smaller competitors from efforts by dominant rivals to drive them from the market through the use of most favored nations clauses. Significantly, respondent Blue Cross is not the only dominant health insurer in this country. Blue Cross plans in several states have substantial market shares, particularly in relation to their competitors. Pauly, *Competition in Health Insurance Markets*, 51 Law & Contemporary Problems 237, 242-43 (1988). The use of most favored nations clauses or similar predatory tactics by these large insurers would harm the public by significantly limiting the ability of managed care plans to compete.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously held that a "most favored nations" policy implemented by a monopolist is not exclusionary (and therefore not unlawful) unless the supplier is forced to sell below its cost. 883 F.2d at 1110. In so ruling, the court confused predatory pricing and nonprice predation. The issue whether price is below cost is relevant in a predatory pricing case because price is the means by which competition can be harmed. In a nonprice predation case, it is conduct *other* than price which may be exclusionary. For example, a most favored nations clause, particularly when imposed by a monopolist, can harm competitors because it *deters* discounting by suppliers. This can raise the costs of small firms and increase barriers to entry. Miller, *Vertical Restraints and Powerful Health Insurers: Exclusionary Conduct Masquerading As Managed Care?*, 51 Law & Contemporary Problems 195, 233 (1988); Baker, *Vertical Restraints Among Hospitals, Physicians and Health Insurers that Raise Rivals' Costs*, 14 Am. J. Law & Med. 147, 168 (1988).

A firm such as Blue Cross which possesses market power can engage in predation against its rivals, not by pricing below cost, but by *increasing* the costs of its competitors. Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986). The Court of Appeals ignored this element of exclusionary behavior in ruling that a most favored nations clause implemented by a monopolist is lawful unless suppliers are forced to sell below cost. Antitrust jurisprudence holds that a most favored nations clause can unreasonably harm competitors, regardless of the price suppliers charge.

ARGUMENT

THE COURT OF APPEALS WRONGLY HELD THAT MOST FAVORED NATIONS CLAUSES AT ABOVE-COST PRICES CANNOT BE EXCLUSIONARY.

The Prudent Buyer policy implemented by Blue Cross was the equivalent of requiring a most favored nations clause in the participation contracts of all physicians. The Court of Appeals viewed this practice as merely an attempt by Blue Cross to get the best price possible. But the record in this case, which is consistent with economic theory, shows that the purpose and effect of the Blue Cross policy was precisely the opposite: the most favored nations clause discouraged discounting by physicians and instead raised the costs of Blue Cross' rivals, especially Ocean State. This practice by Blue Cross was an abuse of market power and violated the Sherman Act.

A. The Blue Cross Most Favored Nations Clause Was A Type Of Nonprice Predation, Not Predatory Pricing.

The petitioners contend that the Blue Cross Prudent Buyer policy violated Section 2 of the Sherman Act, under which it is unlawful to "monopolize . . . any part of the trade or commerce among the several states." 15 U.S.C. §2. A plaintiff must prove two elements to establish the offense of monopolization: (1) the possession of monopoly power and (2) the willful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). It has been shown that Blue Cross possesses monopoly power. The sole issue is whether Blue Cross improperly maintained that power.

Put another way, the issue is whether the Prudent Buyer policy constitutes "exclusionary" conduct, which is defined as "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, *Antitrust Law* ¶626b at 78 (1978), *quoted by Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985).

The courts have identified several types of behavior which are considered to be exclusionary. For example, predatory pricing, or pricing below cost, is unlawful conduct for a monopolist. *See, e.g., Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-33 (1st Cir. 1983). Many commentators have noted that predatory pricing is unlikely to occur, as the predator would suffer losses greater than those of the victim during the period of below-cost pricing. Moreover, the monopolist would draw new entrants when prices were increased to supra-competitive levels to recoup the lost profits. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 272 (1981). This Court apparently agrees. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589-90 (1986) ("For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.")

There is a viable manner in which monopolists can engage in predation against their rivals, however. By raising their rivals' costs but not their own, monopolists can exclude competitors without suffering losses. The manner in which this can be done is to contract with suppliers for their agreement not to deal with the monopolist's competitors, or at least not to deal with them on equal terms. Krattenmaker & Salop, *Anticompetitive Exclusion*, 96 Yale L.J. at 223-24; Campbell, *Predation and Competition*

in Antitrust: The Case of Nonfungible Goods, 87 Colum. L. Rev. 1625, 1629 (1987).

A most favored nations clause, such as the Blue Cross Prudent Buyer policy, can be a means of raising rivals' costs. Generally, a most favored nations clause provides that the seller will pass on to the buyer any lower price offered to another buyer during the term of the contract. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 Wisc. L. Rev. 887, 901. Blue Cross imposed a most favored nations clause on Rhode Island physicians by insisting that it would pay no more for any service or procedure than any other payer. 883 F.2d at 1110.

The Court of Appeals below erroneously analyzed the Prudent Buyer policy as a predatory pricing case. In ruling that the Blue Cross most favored nations policy was not exclusionary as a matter of law because it did not cause physicians to sell their services at a price below cost, 883 F.2d at 1110, the court missed the point of a most favored nations clause entirely. The Prudent Buyer policy is illegal because it encouraged physicians *not to participate* in the plans of Ocean State and other Blue Cross competitors.[4]

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[4] The Court of Appeals' reliance on the *Kartell* case is likewise misplaced. 883 F.2d at 1110-11. *Kartell* involved an action by physicians against Blue Shield of Massachusetts challenging a policy which limited the amount physicians could bill patients. *Kartell v. Blue Shield of Massachusetts*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985). Petitioners in this case do not suggest that the law prohibits negotiation regarding fee levels between Blue Cross and physicians. As a monopolist, Blue Cross simply may not enter into contracts which unreasonably discourage physicians from dealing with managed care plans such as Ocean State.

B. The Blue Cross Most Favored Nations Clause Was Exclusionary.

While most favored nations clauses may appear to be a means of assuring lower prices, they usually have the opposite effect when imposed by a purchaser with market power. That is, most favored nations clauses *discourage* discounting by reducing sellers' incentives to decrease prices. With most favored nations clauses in effect, a seller contemplating a discount to one buyer knows that the discount must be given to *all* buyers with such a clause in their contracts. Any price decrease therefore becomes more expensive for the seller, and less likely to occur. Clark, *Price-Fixing Without Collusion*, 1983 Wisc. L. Rev. at 901-02, 932; Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 Boston Univ. L. Rev. 521, 539 n.92 (1984).

The United States Department of Justice has affirmed that the use of most favored nations clauses can harm competition in the health care market: (1) where the buyer imposing the clause is so significant that "a very high percentage of all providers feel they must contract with it," and (2) where the payer accounts for such a large portion of the providers' total billings that there would be an insufficient volume of provider services to support entry to the market by other payers. C. F. Rule, Assistant Attorney General, Antitrust Division, Remarks Before the Connecticut Bar Association, *Antitrust in the Health Care Field: Distinguishing Resistance From Adaptation* p.21-23 (March 11, 1988).

Both conditions exist in the present case. First, ninety percent of Rhode Island physicians contract with Blue Cross, no doubt due to their application of simple arithmetic—Blue Cross has over 500,000 subscribers, and the next largest private insurer has only 70,000. Second, Blue Cross accounts for such a large proportion of the business

of Rhode Island physicians that there are insufficient non-Blue Cross physicians to support a new entrant to compete with Blue Cross. After all, nearly one-third of Ocean State physicians found it more advantageous to forego participation with Ocean State entirely than to discount their Blue Cross business. Miller, *Vertical Restraints and Powerful Health Insurers*, 51 Law & Contemporary Problems at 233-34. Thus, the use of a most favored nations clause by Blue Cross alone was sufficient to discourage discounting by a substantial number of Ocean State physicians.

The holding of the Court of Appeals conflicts squarely with a recent district court opinion currently on appeal to the Court of Appeals for the Tenth Circuit. In that case, *Reazin v. Blue Cross & Blue Shield of Kansas*, 663 F.Supp. 1360 (D.Kan. 1987), Kansas Blue Shield implemented a most favored nations clause in its contracts with providers. 663 F.Supp. at 1375-76. Disgruntled providers and a competing HMO challenged this and other practices of Kansas Blue Shield. In ruling on post-trial motions following a jury verdict for the plaintiffs, the court commented on the effect of the most favored nations clause:

> The jury could readily understand the existence of this clause effectively prevented discounting to other insurers, and . . . the "most favored nations" clause effectively prevents competing insurance companies from offering more favorable insurance rates to consumers. This clause gives defendant the ability to prevent insurance prices from falling, thus providing it the ability to effectively control insurance prices.

Reazin, 663 F.Supp. at 1418. Thus, the court recognized that rather than leading to *lower* prices, a most favored nations clause instituted by a dominant buyer can reduce discounting, and harm smaller, lower-priced competitors such as HMOs, resulting in higher prices for consumers.

This is particularly troubling in a market dominated by a large insurer because, as the *Reazin* court noted, HMOs and other alternative delivery systems represent the *only* effective challenge to the dominance of Blue Cross plans. 663 F.Supp. at 1417. The Blue Cross Prudent Buyer policy had precisely the same effects as the most favored nations clause in *Reazin*—it raised Ocean State's costs and enabled Blue Cross to increase the price of its premiums—and was likewise illegal.

In an analogous case, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), this court held that an industry-wide collective bargaining agreement whereby employers and a labor union agreed on a wage scale that exceeded the financial ability of some operators to pay, made for the purpose of forcing some employers out of business, was illegal. The labor agreement was simply a means of raising rivals' costs to exclude small competitors from the market, much like the most favored nations clause in the present case. *See* Campbell, *Predation and Competition in Antitrust*, 87 Colum. L. Rev. at 1629.

C. The Blue Cross Most Favored Nations Clause Was Not A Legitimate Cost Saving Device.

The Court of Appeals validated the Prudent Buyer policy because it was viewed simply as an attempt to achieve lower costs. 883 F.2d at 1110. But the discount imposed on physicians by Blue Cross was very different from the fee withhold agreed to by Ocean State physicians. Blue Cross forced a simple decrease in the amount physicians charged their patients. In contrast, physicians who contracted with Ocean State agreed to a twenty percent withhold as a means of sharing in the risk of Ocean State's profitability. These physicians did *not* discount the fees

charged their patients, but rather "allowed their reimbursement to vary with the financial health of the HMO." Baker, *Vertical Restraints*, 14 Am. J. Law & Med. at 161 n.55. Blue Cross physicians were assessed the fee reduction regardless of the profitability of Blue Cross.

Moreover, Ocean State, as an HMO, purchased a different commodity from physicians than did Blue Cross. Ocean State received a commitment to share the risk of the venture, and to engage in utilization review and other efficiency-enhancing programs. Blue Cross simply contracted for an agreement that physicians would not accept a lesser amount for their services from other insurers. *See* Remarks of C. F. Rule, *Antitrust in the Health Care Field* at 21-22. Blue Cross was therefore not attempting to assure that it paid no more than Ocean State for the *same* services; Blue Cross bargained for a different bundle of services.

The Court of Appeals also gave insufficient weight to evidence that the most favored nations policy was aimed at *raising* Ocean State's costs rather than lowering those of Blue Cross. Blue Cross applied the Prudent Buyer policy only to Ocean State physicians, and made no effort to determine whether other insurers received discounts from physicians. (J.A. 779-80, 845-46.) If Blue Cross were intent on lowering costs, why would it not apply the policy to all physicians? This incongruity has been found by commentators to be especially probative in noting the absence of a cost saving motive by Blue Cross. Baker, *Vertical Restraints*, 14 Am. J. Law & Med. at 161; Miller, *Vertical Restraints and Health Insurers*, 51 Law & Contemporary Problems at 234.

There is also direct evidence that Prudent Buyer was not intended as a cost saving device. Blue Cross made no estimates of anticipated cost savings in planning the Pru-

dent Buyer policy. (J.A. 336-37, 850-51.) Moreover, a Blue Cross executive testified that the Prudent Buyer program was not designed to lower Blue Cross' costs. 692 F.Supp. at 71. Finally, Blue Cross recognized the effect its most favored nations clause would have on Ocean State: "not one guy in the state isn't going to know the implication of signing with Ocean State." 883 F.2d at 1113.[5]

The Court of Appeals perceived the clarity of this intent evidence, but nevertheless held that intent to harm alone does not violate the Sherman Act. However, intent to harm by a monopolist together with conduct which substantially and unreasonably impedes the ability of competitors to contract with their suppliers *does* violate the law. By enacting the Prudent Buyer policy, Blue Cross has entrenched itself as the dominant insurer in Rhode Island. The most favored nations clause decreases the likelihood that physicians will discount their services to new HMOs, thereby increasing the costs of entry to the market. Baker, *Vertical Restraints*, 14 Am. J. Law & Med. at 168 n.78.

Finally, the Court of Appeals repeatedly remarked that Blue Cross was able to lower its costs to some degree by means of the Prudent Buyer policy, thereby creating "efficiencies." In fact, the court indicated that the creation of efficiencies alone is enough to find monopolistic conduct lawful.[6] This is simply wrong. Conduct which has

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[5] The Court of Appeals termed this a *hope* on the part of Blue Cross that its actions would damage Ocean State. This curious choice of language for strongly-worded evidence of intent indicates the degree of deference granted Blue Cross by the court below.

[6] "The fact remains that achieving lower costs is a legitimate business justification under the antitrust laws." 883 F.2d at 1111 n.11.

the purpose and effect of injuring rivals, increasing barriers to entry and enabling a monopolist to raise its prices cannot be condoned simply because the perpetrator's costs may decrease in the process. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273-74, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). There are certain things a monopolist may not do. Forcing a contract provision on suppliers which eliminates their financial incentive to deal with the monopolist's competitors is one of them.

CONCLUSION

For all the foregoing reasons, and for those set forth in the petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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